82-1238

NO. 83-_____

In The
SUPREME COURT
of the
UNITED STATES

October Term, 1982

MURRAY MEYERSON, et al, MAYOR and CITY COMMISSIONERS OF THE CITY OF MIAMI BEACH,

Petitioners,

vs.

ESPANOLA WAY CORP., a Florida Corporation

Respondent.

On Petition for Writ of Certiorari
From The United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

THOMAS M. PFLAUM, Esq.
SIMON, SCHINDLER & HURST, P.A.
1492 S. Miami Ave.
Miami, FL 33130
(305) 358-8611

JOHN A. RITTER, Esq.
JEAN KRONHEIM, Esq.
CITY OF MIAMI BEACH
1700 Convention Ctr Dr
Miami Beach, FL 33119
(305) 673-7470

Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review by this Court are:

A. Whether the absolute legislative immunity of City Commissioners encompasses their discussions and debate during legislative session, or rather is limited to their affirmative and negative votes on proposed legislation?

B. Whether the Federal Court should hypothesize the basis for a purported §1983 action and allow the case to proceed based on that hypothetical federal claim, or rather should require the Plaintiff to actually state the alleged violation of a federal right, privilege, or immunity?

C. Whether under Rule 56(e), Fed. R. Civ. P., it is sufficient for a Plaintiff to state, in response to the movants' affidavits and supporting evidence specifically refuting each and every substantive allegation of Plaintiff's complaints and raising an absolute immunity defense, that she believes her own allegations to the best of her knowledge?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit dated November 1, 1982, appears in the Appendix at page 47. The decision of the District Court appears in the Appendix at page 45.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The decision below was rendered November 1, 1982, and a Petition for Rehearing was denied December 1, 1982. Jurisdiction to review this case is conferred by 28 U.S.C. §1254. Certiorari review is appropriate because the case involves important questions of federal law, because the Eleventh Circuit rendered a decision in conflict with the decisions of this Court and other federal circuit courts, and because its de-

cision so far departs from the accepted and usual rules of appellate review as to call for an exercise of this Court's power of supervision.

CONSTITUTIONAL PROVISIONS, STATUTES & FEDERAL RULES INVOLVED

Article I, §6(1) of the United States Constitution:

> "The Senators and Representatives shall... be privileged ...for any speech or debate in either house, they shall not be questioned in any other place."

Title 42, §1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Rule 56(e), Fed. R. Civ. P.:

> "...when a Motion for Summary Judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his

pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Rule 8, Fed. R. Civ. P.:

"A pleading which sets forth a claim for relief... shall contain (1) a short and plain statement of the grounds upon which the Court's jurisdiction depends... (2) a short and plain statement of the claim showing that the pleader is entitled to relief..."

STATEMENT OF THE CASE AND FACTS

For purposes of this Petition, Respondent Espanola Way Corp. (Plaintiff and Appellant below) will be identified as "Plaintiff." Petitioners (Defendants and Appellees below) will be referred to as "Defendants" and/or "Commissioners."

In late September 1980, the Clay Hotel (owned by the Plaintiff) was inspected by the Code Enforcement Department of the City of Miami

Beach and cited with nearly 350 housing code violations. See Plaintiff's Complaint, Appendix page 11. (The violations included such things as faulty window frames, missing screens, leaking faucets, faulty light fixtures, and so forth.) Plaintiff evidently corrected most of the violations and/or obtained administrative relief, in the form of a one-year extension to make the needed repairs, from the City's Minimum Housing and Commercial Property Appeals Board, an administrative agency of the City.

As alleged in Plaintiff's Complaint, albeit in a confusing and misleading fashion, beginning around mid-1980 and continuing until quite recently, the City of Miami Beach was battered by an unprecedented increase in crime which affected South Florida generally and was attributed at least in part to the Cuban refugee boat lift of May 1980. The South Florida "crime

wave" of 1980 and 1981 resulted in substantial negative publicity for the area which was viewed with special alarm by the City of Miami Beach, a prime tourist area. The natural concern of the City's residents and political leaders toward the crime statistics and publicity was compounded by the widespread perception (actually well-founded) that the southern portion of the City was becoming a slum due to deteriorating housing, including large numbers of apartments and apartment-hotels which were legally substandard and tended to attract vagrants and criminals as well as the latter's elderly prey.[1/]

1. Indeed, Southern portions of the City have been declared legally blighted under Florida law, and these findings have been approved by the State and Federal courts in prior litigation. See e.g. Bradley et al vs. United States Department of Housing & Urban Development, et al, 658 F.2d 296 (5th Cir. 1981); State of Florida, et al vs. Miami Beach Redevelopment Agency, 392 So.2d 875 (Fla. 1980).

The dual problems of rampant crime and deteriorating housing become the principle issues in Miami Beach for nearly two years, virtually to the exclusion of all other issues. Some community leaders attributed both problems to Fidel Castro and the United States Government's failure to control immigration; others attributed the crime wave to the existance of substandard structures in the City (and vice versa); others (including one or more of the Defendant Commissioners) attributed much of the problem to the City's own failure to implement a major Redevelopment project in the City, including the building moratorium which was adopted in the mid-1970's as a "temporary" measure related to the Redevelopment project, but which has been extended up to the present date, and which (they argued), was itself the source of the spreading deterioration of buildings in the City.

Whatever the merits of these various hypotheses, the important point is that the debate was extremely serious: the increase in major crimes was in fact unprecedented and large areas of the City were in fact becomming virtual slums, and the Defendant Commissioners, as elected officials, were the individuals responsible for solving these two threats to the health, welfare and safety of the community.

The Commissioners responded with various measures: citizen-action committees and crime advisory groups were created, special police procedures were implemented, emergency crime laws adopted, and so forth, and crime and/or building-code enforcement was discussed at virtually every City Commission meeting for nearly two years. At a City Commission meeting of April 1, 1981 (a meeting not especially remarkable yet one specifically identified in Plaintiff's Com-

plaint) these two issues were discussed and debated once again by the Commissioners, members of the public in attendance, and the City Manager (essentially the City's executive official) and Police Chief. As shown by the Commission transcript contained in the Appendix at pages 1-10, the discussions were at times heated, but the general theme of the discussion was that the Commissioners wanted the City administration to strictly enforce the building codes to rid the City of dilapidated housing. While some of the Commissioners said little or nothing at all, others aggressively demanded new legislation or new policies to combat crime and/or building code violations. One of the Defendant Commissioners specifically instructed the City Manager to strictly enforce the building code even if a building owner was, like Plaintiff, a prominent member of the community. Other Commissioners

sought recommendations from the City Manager, the Police Chief and others as to possible new policies or legislation; one of the Commissioners argued that the problems were caused by prior City legislation (the "South Beach Redevelopment" project with its attendant building moratorium) which, he argued, should be repealed. Others noted the need for additional jails and courts in Dade County, resources which would require state and local legislation to fund and implement.

In short, the Commissioners of the City of Miami Beach were doing precisely what they were elected to do as local legislators -- attempt to solve the two major (and arguably related) problems of crime and dilapidated housing in the City. No one who has any familiarity with local government would find any of this remarkable, much less actionable. Even less could these dis-

cussions be actionable as a "civil rights" violation.

Indeed, the above events would not be worthy of this Court's attention but for Plaintiff's suit, filed in April, 1981, vaguely alleging that the Defendant Commissioners were out to "harass" Plaintiff's hotel, apparently by creating a "task force" to write unjustified building-code citations against the Plaintiff. Plaintiff's complaint vaguely refers to the above facts and circumstances in a provocative fashion and tries to blur the fact that Plaintiff was cited with the multiple building-code violations long before the April 1st Commission meeting.

Plaintiff's Complaint exemplifies all that is wrong with many of the §1983 "Civil Rights" suits now clogging the District Courts. Plaintiff's vague allegation that the Commissioners set out to "harass" Plaintiff's hotel by means of

a building code "task force," does not state how or even when this harassment occurred, nor suggest how it violates a federal right, privilege or immunity. At the same time, the Complaint affirmatively alleged that Defendants' misconduct (whatever it was) resulted from their official legislative activities. The Complaint specifically and expressly alleged that the Defendants' statements and acts were made and taken in their capacities as City Commissioners, and nowhere alleges any act or statement outside that legislative capacity. The Complaint is completely devoid of the very basic elements that must be pled in a §1983 complaint, questions as to what injuries Plaintiff suffered and how they were caused by the conduct of Defendants; thus it is perhaps mere quibbling to note that the Complaint fails to identify any federally-guaranteed right or privilege violated by the Defendants. If very liberally construed, the Complaint alleges:

1. The Commissioners decided to attack hotels housing Cuban refugees, and/or hotels which repeatedly sought police assistance, and created a task-force of building and fire code inspectors and directed them to conduct frequent inspections of these hotels to drive them out of business;

2. Plaintiff received 344 unjustified citations.

3. All the actions and statements of the Defendants were done as legislative officials of the City of Miami Beach.

In light of these transparently inadequate allegations, Defendants filed a motion to dismiss or alternatively for summary judgment, with an accompanying memorandum attaching affidavits from each of the Defendants along with a certified transcript of the April 1, 1981 Commission meeting cited in the Complaint. (See

Appendix at page 16.) Defendants argued that: (a) the Complaint failed to state a proper federal claim; (b) the Defendants had acted at all times in their legislative capacities, as affirmatively alleged in the Complaint and verified by their affidavits and the transcript, and therefore were entitled to absolute immunity from suit, and; (c) even if Defendants were not absolutely immune, the affidavits and transcripts established they had no personal knowledge of or personal involvement in any task force or even the inspections of the Plaintiff's hotel, had never created any task force nor directed anyone to write code citations against Plaintiff or anyone else, nor done any of the other things Plaintiff alleged, and therefore the Defendants should be granted summary judgment based on their qualified good-faith immunity and their complete lack of involvement in the matters complained of.

After the time had passed under the local Federal rules for Plaintiff to respond, Plaintiff filed an (untimely) response containing only the conclusory statement by Plaintiff's owner that she believed the allegations of the Complaint were true, "to the best of her knowledge." (See Appendix, page 33.) Plaintiff submitted no evidence at all to bolster the Complaint, nor provided an affidavit containing specific assertions of fact to rebut the Defendants' proof of absolute immunity and lack of involvement or even knowledge of the inspections of Plaintiff's hotel.

On June 18, 1981, the District Court entered an order in which the court stated it was granting summary judgment against the Plaintiff on the multiple grounds that (a) the Complaint failed to state a proper federal claim in that it failed to identify any violation of a federal right; (b)

that the Defendants were absolutely immune from suit, and; (c) even if the Defendants were not absolutely immune, they had established a good faith defense which the Plaintiff had failed to rebut under Rule 56(e), Fed. R. Civ. P. (See Appendix, page 45.)

Plaintiff appealed to the Eleventh Circuit, which reversed the trial Court's decision in every respect. The Eleventh Circuit, whose decision appears at page 47 of the Appendix, generously "paraphrased" the Complaint to inject a Federal claim which did not appear in the Complaint, held that although the Plaintiff had failed to include a "specific mention" of Federal or Constitutional right, the Complaint contained factual allegations (as paraphrased by the Court) sufficient to justify a **hypothetical** federal claim, held the Defendants were not entitled to absolute legislative immunity because

they were "merely discussing" issues rather than adopting legislation, and held that the evidence was insufficient to justify summary judgment based on qualified good-faith immunity without even noting Plaintiff's complete failure to submit any evidence at all on the issue as plainly required by Rule 56(e) of the Federal Rules of Civil Procedure. This Petition arises from the 11th Circuit Court's decision.

THE QUESTIONS ARE SUBSTANTIAL

I.

THE OPINION OF THE ELEVENTH CIRCUIT WAS CLEARLY ERRONEOUS, CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT AND THE OTHER CIRCUIT COURTS, AND SERIOUSLY DEPART FROM ACCEPTED APPELLATE REVIEW PRINCIPLES SO AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER. IN ADDITION, THE ELEVENTH CIRCUIT'S DECISION WITH REPSECT TO LEGISLATIVE IMMUNITY, §1983 PLEADING REQUIRMENTS AND RULE 56(e) RAISE IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

A. Legislative Immunity.

The Eleventh Circuit erroneously held that "mere discussions" by legislative officials are

not absolutely privileged and immune from suit. At pages 293 and 294 of its decision, the Eleventh Circuit wrote:

> "The Commissioners seek to invoke an absolute immunity under §1983 for their allegedly unconstitutional acts. The Fifth Circuit has recognized such an immunity in favor of local legislators for conduct in furtherance of their legislative duties... [T]he absolute immunity inquiry becomes one of whether the Commissioners in the instant case were engaged in legislative activity. In the cases finding absolute immunity, the legislative function has involved actions such as the vetoing of an ordinance passed by the city's legislative body... and the examining of a Plaintiff before a legislative committee... Hernandez also noted that the vote of a city councilman constitutes an exercise of legislative decision-making. Here, apparently the Commissioners were merely discussing crime and efforts to reduce it by enforcing building and fire code violations. No act or resolution was contemplated or passed. No vote was taken..."2/

2. The Eleventh Circuit's statement begs the question how a City Commissioner could, under any set of facts and legal theory, be held liable for "merely discussing crime and efforts to reduce it." The Court's statement only confirms that the case was correctly disposed of by summary judgment, since the Defendants' conduct was utterly nonactionable.

As affirmatively alleged in the Plaintiff's Complaint, and as subsequently confirmed by Defendants' affidavits and exhibits, Defendants clearly were "acting in a legislative role" with respect to their "mere discussions" of crime and code enforcement in the City of Miami Beach. Paragraphs 4, 6, 12, 13 and 14 of Plaintiff's Complaint affirmatively alleged that "each and all of the acts set fourth herein" were done by the Commissioners "under the authority of the office of Commissioner of the City," and that the Defendants' conduct toward the Plaintiff occurred "at various meetings of the Miami Beach City Commission." Thus the Commissioners' misdeeds, whatever they were, were alleged to have occurred at regular public sessions of the Miami Beach City Commission, while the Defendant Commissioners were seated in their official chairs in the Commission Chambers, and this allegation was confirmed by the Commission

transcripts introduced by Defendants. In addition, each of the Defendants' affidavits, which were not challenged by Plaintiff, stated that their actions with regard to code enforcement were based on their legislative duties and arose from the discharge of their "duties as a legislator." The source of this litigation thus arises as much from the legislative conduct of the Defendants as if the suit challenged statements or decisions by United States Senators while they were seated in full session of the United States Senate.

This Court must review and reverse the Eleventh Circuit's ruling that "mere discussions" by a legislative body -- unlike acts of "vetoing," "examining witnesses," or adopting "acts or resolutions" -- are not protected by absolute legislative immunity. The Eleventh Circuit's error in announcing such a distinction seems quite glaring, since a legislative body can

hardly be expected to adopt or reject legislation, much less do so intelligently, unless it is first able to discuss it and, perhaps because of the discussions, decide not to take any substantive action at all. If absolute legislative immunity exists, it must include the discussions of a legislative body, which are obviously fundamental to the very process of legislating. Under the Eleventh Circuit's rule, legislators could never debate or discuss an issue knowing whether their statements were immune or not, since their immunity would arise only if an act or resolution resulted from the debate, which they could not know in advance. Under such a principle, legislators would have to meet secretely in advance of public session to decide among themselves whether the majority will adopt legislation (or "veto" legislation, etc.) and thus "immunize" their public discussions, and this would stand the entire policy of immunity on its head. If

the immunity concept is to have any meaning at all, it certainly must include the debates and discussions of municipal legislators during legislative sessions, whether the discussions result in a substantive act by the majority, or result in a decision by the majority that substantive action is not in the public interest.[3/]

The law as stated by this Court and the other Circuit Courts is not at all what the Eleventh Circuit held with respect to the "mere discussions" of a legislative body. In Tenney v. Brandhove, 341 U.S. 367-71 S.Ct. 783, 91 L.Ed. 1019 (1951), a claim arose from a legislative

3. In addition, the Eleventh Circuit's rule is utterly inconsistent with its own "paraphrasing" of the Complaint, which was that the Defendants allegedly created a task force to harass hotels housing Cuban refugees. See infra at Section B, page 28. If the Commission did create a task force to harass the Plaintiff, as the Plaintiff alleged according to the Eleventh Circuit, then there was no justification for the court simultaneously rejecting the absolute immunity defense on the inconsistent grounds that the Defendants "merely discussed" (cont. next page)

committee's utterance of an alleged libel, the committee's statements that the Plaintiff should be prosecuted, and the reading into the Committee's record of alleged criminal activities by the Plaintiff. All these alleged misdeeds are conceptually indistinguishable from those alleged in the Complaint below, at least as paraphrased by the Eleventh Circuit, and this Court held that such activities were legislative activities and thus encompassed by the absolute immunity defense:

> The privilege of legislators to be free from arrest or civil process for what they do or say ["mere discussion"] in legislative proceedings has taproots in the Parlimentary struggles of the Sixteenth and Seventeenth Centuries. . . Freedom of speech ["mere discussion"] and actions in the legislature was taken as a matter of

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3. (cont.) crime. Conversly, if the Defendants were "merely discussing" crime, as the Eleventh Circuit elsewhere stated, then the Defendants' conduct could not be deemed actionable under any set of facts or legal theories and the suit was properly disposed of by summary judgment.

> course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written in the Articles of Confederation and later into the Constitution... The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. 'In order to enable and encourage a representative of the public to discharge his public trust with firmness and success it is indispensibly necessary, that he enjoy the fullest liberty of speech, ["mere discussion"] and that he should be protected from the resentment of everyone, however powerful, to whom the exercise of the liberty may occassion an offence'.
>
> Supra at 786 (Emphasis supplied.)

Quoting the Massachusetts Supreme Court on the equivalent provision in the Massachusetts Constitution as a source of the Federal Speech and Debate Clause, this Court wrote:

"These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office; and I would define the article as securing to every member exemption from prosecution, for everything said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules."

Id. at 787. (Emphasis Supplied.)

Thus, this Court concluded in Tenney that the very type of activities which the Eleventh Circuit held were "mere discussions" (and thus not protected) were protected as a matter of absolute legislative immunity. Indeed this Court

assumed in Tenny that legislative discussions are more clearly entitled to protection than actual votes or other substantive acts of legislating, while the Eleventh Circuit held the reverse. Under Tenney, the suit below was properly disposed of by summary judgment, since the Complaint alleged no more than the City's legislators, while acting as legislative officials (see paragraph 4 of the Complaint) in the midst of their legislative sessions (see paragraph 6 of the Complaint), debated the relationship between crime and building-code violations and expressed their desire for strict law enforcement, thus executing the legislative role which they were elected to fulfill.

The Eleventh Circuit's decision is also inconsistent with the Fourth Circuit's decision in Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980), which disposed of a similar argument that the

conduct of the local commissioners were "outside of their legislative immunity." In that case, the Plaintiff alleged that the commissioners had met privately with constituents and were improperly influenced as a result of the meetings. The Court held that "proof of these allegations at trial would not remove the Defendants from the scope of their legislative activities." The Court held that private meetings do not remove legislators from the umbrella of legislative immunity, because such activities are "part and parcel of the modern legislative procedures through which legislators receive information possibly bearing on the legislation they are to consider." Supra at 280. If private meetings between legislative officials and their constituents are part and parcel of the legislative process and thus entitled to absolute legislative immunity, because of the transfer of infor-

mation through such discussions, then obviously the discussions between legislators themselves, in session and in chambers, must also be part and parcel of the legislative process. To the same effect, see Hernandez v. City of Layfatte, 643 F.2d 1188 (5th Cir. 1981), in which the Fifth Circuit held that absolute legislative immunity applied not only to actual acts of legislation, but also to a commissions' failure to legislate its action in "tabling" a proposed ordinance, its action in refusing to pass an ordinance after approving it on first reading, its action in assigning a controversal issue to a subordinate agency, and postponing its own decision. All these legislative actions and non-actions were held to be "legislative" and thus within the umbrella of the absolute immunity defense.

Accordingly, not only does the Eleventh Circuit's rule excluding "mere discussions" from

the immunity defense undermine the entire purpose and theory of legislative immunity, it is also inconsistent with established precedent on this issue.

B. The Judicial Editing of Plaintiff's Complaint:

The Eleventh Circuit was also in error in reading into Plaintiff's Complaint its own hypothetical federal claim which does not appear in the Complaint itself. The Eleventh Circuit in its decision below wrote:

> Although no specific mention is made of a federal constitutional right, the complaint does contain factual allegations sufficient to state a Section 1983 claim based on the Fourteenth Amendment -- that the Commissioners are taking Appellant's property in violation of due process of law... Florida Law recognizes business reputations/goodwill as an interest protectable under the strictures of §1983.

If this Court reads Plaintiff's Complaint, it will note that it does not mention the Fourteenth Amendment, does not mention any taking of

property without due process of law, does not mention "due process" at all, and does not mention business reputation or goodwill. Plaintiff's Complaint could be based on a "business-reputation" tort, or on Defendants' alleged racial animosity against persons of Cuban descent or -- as Plaintiff's counsel alleged at oral arguments before the Eleventh Circuit -- on an economic conspiracy between certain hotel owners and the City Commissioners to injure Plaintiff, or on a multitude of alleged violations of federal laws governing local crime and code enforcement, or on dozens (or hundreds) of possible other theories. Myriad hypothetical claims are conceivable, but the question is whether a Federal circuit court should unilaterally choose one and judicially "construe" it into a complaint. Without a claim plainly stated in the Complaint, it is difficult to see how the Defendants are to

defend themselves, or how the trial court is to decide if Plaintiff's have won the case.4/

It hardly seems necessary to cite cases for the proposition that a §1983 Complaint must allege what federal right has been violated. This principle has been stated over and over again by this Court and various Circuit Courts. See Gomez v. Toledo, 446 U.S. 635, 100 S.Ct. 1920, 1923 (1980); Davis v. Passman, 442 U.S. 228, 99 S.Ct. 2264 (1979); Hampton v. Mow Sun Wong, 426 U.S. 88, 96 S.Ct. 1895 (1976); Albany Welfare Rights Organization Day Care Center, Inc. v. Schreck, 463 F.2d 620 (2nd Cir. 1972); Mukmuk v. Commissioner of Department of Correctional Ser-

4. Indeed, Petitioners are now puzzled whether the Plaintiff is limited to the Eleventh Circuit's reconstruction of the Complaint. For example, is the Plaintiff now required to prove the chronology of events which the Eleventh Circuit said Plaintiff alleged, or the chronology actually appearing in the Complaint, and must it prove the "reputation" tort noted by the Eleventh Circuit or any other claim Plaintiff later decides is appropriate?

vices, 529 F.2d 272 (2nd Cir. 1976), cert den 96 S.Ct. 2236 (1976); Place v. Shepard, 446 F.2d 1239 (6th Cir. 1979); and Bishop v. Tice, 622 F.2d 349 (8th Cir. 1980).

If only as a matter of Rule 8, Fed. R. Civ. P., a §1983 suit must allege how Plaintiff was injured, how Defendant injured him, and why the injury constitutes a violation of a federally guaranteed right or privilege. Not one of these three requirements was met by the Complaint below, and it was quite improper for the Eleventh Circuit to attempt to remedy this deficiency by paraphrasing the Complaint and inventing the Plaintiff's federal claim.

C. The Qualified Immunity Issue Under Rule 56(e), Fed. R. Civ. P.

This Court should also review and reverse the Eleventh Circuit's decision with respect to

the "qualified immunity" issue, in that the Eleventh Circuit failed completely to note the Plaintiff's failure to comply with Rule 56(e) Fed. R. Civ. P.

In response to Plaintiff's Complaint, Defendants each filed individual sworn affidavits stating that they (1) had no knowledge of or involvement in any inspection of or citations against the Plaintiff; (2) never created or legislated the creation of any task force; (3) never designated Plaintiff's hotel for harassment or for code enforcement "targeting"; (4) never tried to close Plaintiff's hotel or any other hotel. Defendants submitted a certified transcript which confirmed all these denials.

These specific sworn denials and supporting evidence directly refuted every material allegation in Plaintiff's Complaint, and also affirmed

Plaintiff's own allegation that Defendants at all material times were acting in their legislative capacities.

Plaintiff made no timely response at all under the Local Federal Rules, and then responded with an affidavit by Plaintiff's president stating:

> "I have read the complaint in [this] action. I believe the allegations contained therein to be true to the best of my knowledge."

That was the Plaintiff's entire response. Plaintiff's belief that her own allegations were true ("to the best of her knowledge") was not even at issue, and was surely not relevant to the existance of a material issue in the case. Plaintiff submitted no evidence whatsoever and did not refer to any facts or evidence she thought might exist, and Plaintiff's Complaint alleged no specific facts or evidence of wrongdoing either. The Eleventh Circuit,

nevertheless, rejected the lower court's qualified immunity finding without recognizing that Rule 56(e) required the entry of summary judgment in Defendants' favor. Rule 56(e) states that "when a motion for summary judgment is made and supported as provided in this rule [e.g. by affidavits and certified transcripts], an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue from trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Again, it would hardly seem necessary to cite cases for a proposition so elementary that a Plaintiff, when confronted with sworn affidavits and certified transcripts demonstrating a total lack of involvement by the Defendants in any of the activities or conduct alleged in the Com-

plaint, and demonstrating an absolute immunity defense, cannot simply file a statement that "to the best of her knowledge" she "believed" her own Complaint. 6 Moore's, Federal Practice, §§56.22 and 56.23 (1982) cites decisions from virtually every circuit court as well as this Court for the contrary proposition, and notes that Rule 56(e) was specifically designed to overrule a line of Third Circuit decisions holding exactly as the Eleventh Circuit did in this case. The last two sentences of Rule 56(e) were added in 1963 to provide that a party could not rest on his pleadings when, as here, the moving party supports his request for summary judgment with affidavits and other evidence. The line of Third Circuit decisions repudiated by the Rule held, precisely as the Eleventh Circuit held below -- albeit soto voce -- that bald allegations were sufficient to maintain a controversy without actally controverting the factual assertions and proof intro-

duced by the moving party. 10 Wright & Miller, Federal Practice & Procedure, §2711 (1973). Here, Defendants swore they had no involvement in, or even knowledge of, the allegedly improper building code citation Plaintiff complained of, and they submitted a certified transcript of the very meeting cited by Plaintiff, which transcript proved their sworn statements were true, and in addition confirmed that all Defendants did was to engage in legislative discourse in legislative session and were thus absolutely immune from suit. Thus Defendants' summary judgment motion cut through Plaintiff's vague and specious allegations and pierced Plaintiff's unfounded "civil rights" claim. Summary judgment was properly entered in this light.

The caselaw from the other circuits confirms that the Eleventh Circuit was wrong in disregarding Plaintiff's violation of Rule 56(e). In R. E. Cruise, Inc. v. Bruggeman, 508 F.2d 415

(6th Cir. 1975), a civil rights suit against city officials for a local building code decision, defendants filed a Rule 56 motion supported, as here, by affidavits showing that Defendants had done nothing wrong and had not been involved in the matters alleged by the Plaintiff. Plaintiff filed no response and the circuit court held summary judgment was properly entered. Plaintiff's failure to respond, the court held, meant the facts stated in the Defendants' affidavits stood uncontroverted and the Plaintiff could not rely on his mere allegations to create an issue of fact.

In the present case, Plaintiff alleged that the Defendants "harassed" Plaintiff and created a "task force" which issued improper building-code citations against the Plaintiff; Defendants filed affidavits showing they never created a task force, and never had any involvement in or even knowledge of the citations. The Transcript

confirmed these denials, in that it proved Defendants' non-involvement in and ignorance of the matters alleged by Plaintiff. Even assuming "improper citations" could constitute a "civil rights" claim (which is not the case), Plaintiff failed to controvert the evidence that these Defendants had no knowledge of or involvement in the alleged Federal wrong. That the summary judgment was properly entered under such circumstances is confirmed by circuit court decisions in Smith v. Saxbe, 562 F.2d 739 (D.C. Cir. 1977), a false arrest civil rights suit in which the Defendants filed Rule 56(e) affidavits contradicting Plaintiff's allegations and Plaintiff did not respond with affidavits rebutting Defendant's statements and the court affirmed summary judgment because Plaintiff failed to substantiate his allegations; Jones v. Hakekulani Hotel, Inc., 557 F.2d 1308 (9th Cir. 1977) in which the defendant filed affidavits in a personal injury

case stating that it wasn't responsible for the dangerous condition which caused Plaintiff's injury, and the court affirmed summary judgment for the Defendant when the Plaintiff failed to submit countering affidavits; Sound Ship Building Corp. v. Bethlehem Steel Company, 533 F.2d 96 (3rd Cir. 1976), in which summary judgment for a defendant in an antitrust case was affirmed when the Plaintiff failed to establish a link between its injury and the Defendant's alleged misconduct and the link was denied in the Defendant's Rule 56(e) affidavit.

Accordingly, this Court should take jurisdiction to review the Eleventh Circuit's decision on the grounds that it conflicts with the decisions of other circuit courts, and renders Rule 56(e) of the Federal Rules of Civil Procedure meaningless.

II.

THE QUESTIONS PRESENTED BY THIS PETITION ARE OF SUBSTANTIAL IMPORTANCE AND THEIR RESOLUTION WILL HAVE NATIONAL IMPACT.

Perhaps because municipalities are often "easy targets" and viewed unsympathetically when in litigation with individuals, they are beleagered by marginal and frivolous §1983 suits in the Federal District Courts. The City of Miami Beach, a City with a resident population of less than 60,000, has recently had to defend itself from a multitude of frivolous "civil rights" suits brought by irritated residents seeking to intimidate or punish City officials due to their action or inaction in one or another purely local problem or policy issue. Only one §1983 suit in many is meritorious and the district courts have, in the City's experience, been fully capable of making the necessary distinction. The frivolous suits -- those filed by residents angry over a traffic arrest or a zoning decision or a gun control ordinance or an unexpected building code

inspection -- must be disposed of quickly if cities are to fulfill their role as effective instrumentalities of local self-government. This is even more important when as here the Plaintiff chooses to name only the individual officials as defendants (rather than the City itself) as a strategy of harassment. Local governments must be afforded the benefit of early dismissals and summary judgments in such frivolous §1983 suits because they simply cannot afford to finance federal litigation over plainly local controversies or purely hypothetical Federal claims. This is especially true when, as here, a Plaintiff refuses to even make a minimal effort to state what he is complaining about and why his complaint belongs in Federal court. This suit is distinguishable only because it is more poorly pled and more obviously frivolous than most, and is nothing more than a thinly-veiled effort by an angry resident to "federalize" an

internal political dispute in the City. No federal right is involved and none is even alleged.

Indeed, this suit would be promptly dismissed even by a state court because it plainly lacks merit and because the Plaintiff does not state a proper or even comprehensible cause of action. Plaintiff received 344 building code citations because she had 344 building code violations, and if the citations were improper the mechanism for relief would be an admimistrative challenge or review by the State courts. In this case, Plaintiff not only failed to challenge the citation in the administrative forum designed for that purpose, but in fact conceeded the validity of the citations by repairing the defects and soliciting and receiving from the City a one-year extension to make those repairs. That the City Commissioners were, at a later time, debating serious social problems in the City, and seeking strict enforcement of the building code,

is not even connected with Plaintiff's injury and could not in any event transpose Plaintiff's grievance over building-code citations into a federal "civil rights" claim. The District Court was correct in recognizing this, and the Circuit Court was in error in reversing that decision.

Petitioners respectively submit that this Court should review and reverse the Eleventh Circuit's decision because neither the District Courts nor local governments in this county have the resources to be generous and liberal with such obviously defective and frivolous federal suits in the manner required by the Eleventh Circuit.

CONCLUSION

The questions presented by this Petition are substantial and of broad public importance. Probable jurisdiction should therefore be noted.

Respectfully submitted,

THOMAS M. PFLAUM, ESQ.
SIMON, SCHINDLER & HURST, P.A.
1492 S. Miami Ave.
Miami, FL 33130
(305) 358-8611

--and--

JOHN A. RITTER
CITY ATTORNEY
CITY OF MIAMI BEACH
1700 Convention Cntr. Dr.
Miami Beach, FL 33119
(305) 673-7470

Attorneys for Petitioners